

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Video Description: Implementation of the)	MB Docket No. 11-43
Twenty-First Century Communications and)	
Video Accessibility Act of 2010)	

REPLY COMMENT

I, Cristina Hartmann, a private individual, hereby submit reply comments in the above-captioned proceeding.

I am a lawyer licensed in Colorado and New York with expertise in accessible telecommunication technologies. My legal internship at Commissioner Copps’ office during the summer of 2008 sparked my interest in the subject. During that summer, I worked on various captioning and video description issues, particularly Internet captioning.

I support the Commission’s efforts to make broadcasting television accessible to people with sensory disabilities. I urge the Commission to make the reinstated regulations as effective and meaningful as possible to improve the television experience of the visually-impaired. This reply comment suggests different ways to maximize the impact of the rules.

I. INTRODUCTION AND SUMMARY

Due to the limited nature of the 21st Century Communications and Video Accessibility Act’s (“CVAA”) video description mandate, effective and meaningful rules are essential.¹ Only nine providers will supply video description, resulting in limited selection of described programming. The inherent restrictions of the video description rules require the Commission to focus on maximizing the impact of the available video description offerings. To do so, the Commission should reexamine the reinstated video description rules where it has the authority to amend the rules.

¹ Twenty-First Century Communications and Video Accessibility Act of 2010 (“CVAA”), Pub. L. No. 111-260, 124 Stat. 2751 (2010) (amending various sections interspersed throughout the United States Code).

The Commission's overuse of the individualized economically burdensome exemption undermines the video description rules' effectiveness. More categorical exemptions focus the covered providers'² video description efforts towards programming that benefit the most from video description. To do otherwise would result in a confusing, hectic and laggard implementation. One way to achieve the goal of meaningful video description is to exempt primarily auditory programming. The Commission, however, should not exempt news programming based on erroneous claims of legal liability and infringements of journalistic autonomy.

Another key factor for effective video description rules is clearly defined exceptions under the technical capability rule. The current definition is vague, particularly the term "minimal cost." The Commission should clarify the ambiguous term by establishing "minimal cost" as a set percentage of the station's or MVPD's gross revenue. Moreover, the Commission should maintain the other programming-related exception to accommodate the realities of legacy analog devices.

The Commission, however, cannot overstep its authority in pursuit of meaningful and effective rules. The CVAA explicitly limits the Commission's power to amend the reinstated regulations. Exemptions and exceptions under the technically capable rules are one of the few permissible areas for further regulation. The Commission, however, cannot regulate programming selection and quality without Congressional approval. Despite such limitations, the Commission may and *should* amend the exemption regime for effective and meaningful video description.

II. MORE CATEGORICAL EXEMPTIONS ARE NECESSARY FOR MEANINGFUL VIDEO DESCRIPTION RULES

The economically burdensome exemption is difficult to implement on an individual level and unsuitable for the fledging video description rules. The exemption is so ambiguous that covered providers will spend unnecessary time and resources petitioning the Commission for exemptions. The Commission must establish more categorical exemptions instead of relying on

² The term "covered providers" refers to all broadcasting stations and MVPDs that are subject to the video description requirements.

the economically burdensome exception. Categorical exemptions provide clearer rules and better implementation.

Since live or near-live programming is the only categorical exemption, the individualized economically burdensome exemption is the primary exemption available to covered providers.³ Under this exemption, the Commission may exempt a covered provider based on various factors affecting the individual provider's ability to describe the type of programming.⁴ Factors include: costs, impact on programming, financial resources, operations type and content.⁵ In essence, the economically burdensome exemption is a balancing test, weighing the benefit of video description with its economic and noneconomic costs. Balancing tests, by their own nature, consider many factors, producing inconsistent and vague results. With such inconsistencies, effective implementation of rules is difficult, if not impossible.

Covered providers will rarely know which programs are exempted because of the highly individualized nature of the economically burdensome exemption. An exemption for one provider does not necessarily apply to another provider. Lack of guidance will result in many covered providers applying for exemptions to clarify their obligations. Moreover, covered providers are not required to comply with the video description regulations while petitioning for an exemption.⁶ Such a system encourages covered providers to seek out exemptions. With multiple covered providers seeking exemptions, it could be a very long time before all of the covered providers actually describe fifty hours of programming per quarter. Therefore, the Commission's reliance on economically burdensome exemption would actually hinder the proliferation of described programming.

The proposed use of the economically burdensome exemption is contrary to its original purpose. In the closed-captioning context, the economically burdensome exemption is a catch-all exemption, intended only for extraordinary circumstances, particularly for smaller providers. The Commission itself acknowledges the unique purpose of the individual exemption, which

³ See *In the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010* ("NPRM"), MB Docket No. 11-43 at ¶ 21 (rel. Mar. 3, 2011).

⁴ 47 C.F.R. § 79.1(f)(2) - (3). The *NPRM* proposes that the economically burdensome exemption use the same factors as the individualized "undue burden test" in captioning. *NPRM*, ¶ 22. See *infra*. Sec IV(a) (discussing the Commission's use of the undue burden standard as a replacement of the individualized economically burdensome standard)..

⁵ *Id.*

⁶ 47 C.F.R. § 79.1(f)(11).

“provide[s] sufficient flexibility to consider unusual cases.”⁷ The Commission should not use an exemption intended for unusual cases to establish standards for an entire industry. Even though the rules only apply to nine networks, the rules will influence any provider that voluntarily offers video description. Moreover, such an exemption cannot handle future expansion of video description.⁸ Therefore, the economically burdensome exemption is unequipped to handle the far-ranging issues raised by video description rules.

This is not to suggest that the individualized economically burdensome exemption should be omitted entirely. Instead, the Commission should not use the individualized economically burdensome exemption as its *main* vehicle for regulating video description. Instead, the Commission should focus on developing clear categorical exemptions for video description.⁹ There is at least one categorical exemption that applies to the video description rules.¹⁰ Categorical exemptions provide many benefits: simple and effective implementation, conservation of the Commission's time and resources, and straightforward future expansion of the video description rules (if desired).

The fact that CVAA only requires fifty hours of described programming per quarter does not excuse the misuse of the economically burdensome exemption.¹¹ It is equally confusing and inefficient to describe fifty or five hundred hours of programming without guidance. Covered providers have many programming options to choose from (primetime and children's programming); guidance is crucial. In fact, the limited nature of the rules makes categorical exemptions even *more* imperative. Since the rules require only few hours of described programming, the sparse offerings should dramatically improve the experience of visually-impaired consumers. They deserve nothing less. Without more categorical exemptions, covered

⁷ *In the Matter of Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996* (“Closed Captioning R&O”), 13 F.C.C. Rcd. 3272 at ¶15 (1997).

⁸ CVAA provides some flexibility for future expansion if inquiries warrant more video description. *See* CVAA § 202(f)(3)-(4).

⁹ CVAA clearly grants the Commission the authority to establish categorical exemptions. § 202(f)(3)(D). *See infra*. Sec. IV (explaining the basis for the Commission's authority to amend particular portions of the reinstated video description rules).

¹⁰ *See infra* Sec. II(a).

¹¹ *Cf. In the Matter of Implementation of Video Description of Video Programming* (“Video Description R&O”), 15 F.C.C. Rcd. 15230 at ¶41 (2000) (refusing to issue categorical exemptions due to the limited nature of the video description requirements).

providers may describe programming that only reaps minimal improvements from the description.

The Commission should not use the economically burdensome exemption as the primary exemption for covered providers. Such an imprecise exemption causes unnecessary confusion and delays. The Commission should not apply an exemption intended only for unusual circumstances and for smaller providers. Due to the issues with the economically burdensome exemption, the Commission must establish more categorical exemptions for clear, effective and efficient rules. The exemptions, however, must be granted on the basis of accessibility improvement, not misguided claims of tort liability and First Amendment infringements.

a. A Categorical Exemption for Primarily Auditory Programming Will Result in More Productive Video Description Rules

Primarily auditory programming qualifies for a categorical exemption under the economically burdensome analysis. Due to the nature of the programming and the cost of video description, it is economically burdensome to describe primarily auditory programming. Primarily auditory programming is programming where content is materially and substantially expressed via auditory means. A categorical exemption for primarily auditory programming directs description efforts toward programming most in need of description. The primarily auditory programming exemption benefits both the covered providers and the visually-impaired.

The CVAA authorizes the Commission to exempt any category of programming if video description would be economically burdensome.¹² Historically, the nature and the cost of description for the programming type are two pivotal factors for the economically burdensome analysis.¹³ The Commission may consider how beneficial the description of certain types of programming is for the visually-impaired relative to the cost of the description. Due to the relatively low number of described programming available, the analysis hinges on the benefit to the visually-impaired population compared with the cost of description.

Video description helps the visually-impaired in a wide variety of contexts, but its benefits are significantly reduced for primarily auditory programming, such as music or speech

¹² CVAA § 202(f)(3)(D).

¹³ 47 CFR § 79.1(f); Closed-Captioning R&O, ¶ 143.

programming. Video description helps the visually-impaired understand the action and context unavailable through dialogue and sound alone. Description of primarily auditory programming only marginally improves contextual understanding of the programming. Such marginal improvement relative to the cost of description is economically burdensome.

The primarily auditory programming exemption mirrors the primarily textual programming exemption in the closed-captioning rules.¹⁴ The primarily auditory exemption would exempt any programming where the content is conveyed substantially and materially via audio. The Commission will need to investigate what types of programming qualify as primarily auditory, but some examples include: musical programming, non-live concerts and perhaps some sporting events. It is nonsensical and inefficient for a covered provider to spend thousands of dollars per hour describing a program that visually-impaired consumers already understand. The Commission has already recognized the importance of effectiveness in relation to cost. Closed-captioning rules exempt primarily textual programming because hearing-impaired viewers already receive crucial information via text.¹⁵

This is not to say that description of primarily auditory programming does not benefit the visually-impaired. Description of body language and costumes improves the viewing experience, but is ancillary to understanding the content. Video description should be used for programming with substantial visual elements; for example, a movie like the *March of the Penguins*. In *March of the Penguin*, the narration only provides a glimpse of the vivid world of penguins in the North Pole. Video description for *March of the Penguins* is crucial for comprehension. There are a limited number of hours per week for described programming, and these hours should count.

Since it is unlikely that the Commission will mandate 100% description of nonexempt programming, it is crucial for the Commission to implement *effective* and *meaningful* video description. The Commission must recognize that not all programming are created equal. Video description improves a visually-impaired individual's experience to varying degrees, depending on the programming. Some programming depends on visual components for coherence, and others do not. The description costs for primarily auditory programming exceed the benefit to the

¹⁴ Primarily textual programming is any programming “for which the content of the soundtrack is substantially and materially displayed visually through text or graphics...” Closed-Captioning R&O, ¶149.

¹⁵ Closed-Captioning R&O, ¶ 149.

visually-impaired. The Commission should categorize primarily auditory programming as economically burdensome and exempt the class from the video description rules.

b. The Commission Should *Not* Exempt News Programming Based on Unfounded Fears of Legal Liability and Infringements of Editorial Freedom

Speculations that mandatory video description triggers legal liability and stifles journalistic freedom misunderstand the law and the role of video description in news programming. The National Association of Broadcasters (“NAB”) alleges that video description would be “an unwarranted intrusion into newsroom editorial decision-making...[and] could open up broadcasters to potential defamation and false light liability.”¹⁶ This statement does a grave disservice to the flexibility of tort and free speech laws. Any plaintiff suing a network based on defamation and false light would fail because of the respective actual malice and highly offensive requirements. Since video description reports on-screen elements, video description does not publish anything that the journalist does not publish himself or herself.

Despite the state-by-state differences, defamation is generally understood as a false statement to a third party which “harm[s] the reputation of another.”¹⁷ More importantly, if the statement involves a matter of public concern, the plaintiff must prove falsity and actual malice.¹⁸ Since virtually all documentaries and news programming are “of public interest,” the journalists would have to prove actual malice and falsity in a defamation action. That is a tall order indeed for a service that merely describes on-screen visual elements.

Like defamation, the tort of false light has agreed-upon elements with some state-by-state variations. False light is a privacy tort where the “defendant attributes to the plaintiff views that he or she does not hold and places the plaintiff before the public in a *highly offensive and untrue manner*” (emphasis added).¹⁹ It is hard to imagine a description of actions, costumes and other visual elements misrepresenting the journalist’s views in a patently offensive manner.²⁰ Even if

¹⁶ NAB Comment for *the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010* at 19 (filed Apr. 28, 2011 in MB Docket No. 11-43).

¹⁷ BLACK’S LAW DICTIONARY, 188 (3rd Pocket Edition, 1996).

¹⁸ *New York Times v. Sullivan*, 376 U.S. 254, 254 (1964). *Sullivan* establishes the constitutional standard for defamation regarding matters of public interest. Actual malice is defined as the “knowledge that [the statement] was false or ... reckless disregard of whether it was false or not.” *Id.* At 280.

¹⁹ BLACK’S LAW DICTIONARY, 280.

²⁰ See generally *infra*. n. 22 and accompanying text.

that was possible, it is unlikely that video description, in its proper form, would qualify as highly offensive.

NAB rightly affirms that the First Amendment prohibits the government from forcing journalists to publish or not to publish their views.²¹ NAB, however, misinterprets the impact of video description on programming content. Video description merely provides the visually-impaired access to information that the *journalist has already published*. It may be helpful to consider what video description does. Video description verbalizes visual elements such as: “[a]ctions, costumes, gestures, and scene changes...”²² Most importantly, video description describes *on-screen activities* without commentary on the meaning of the actions. Video description only reveals what the journalists intend to publish, nothing more. The only way that video description would impinge upon journalistic freedom would be if the narrator inserted his or her own conclusions and opinions into the description. Narrators are trained professionals, and would not besmirch their profession in such a manner.²³

Even though more categorical exemption engenders more meaningful video descriptor rules, news programming does not qualify for a blanket waiver. NAB’s fears of liability and restrictions of free speech are unfounded. Potential defamation or false liability suits fail because of the actual malice or the highly offensive nature requirements, respectively. Any First Amendment challenge also fails because video description does not publicize any element that the journalist does not want to publish. The Commission must look elsewhere for categorical exemptions that maximize the effectiveness of the video description rules.

²¹ See e.g. *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, (1974) (overturning statutes that either forced journalists to publish or not to publish information). It is worth noting that both of these cases received strict scrutiny, the most stringent scrutiny available, because the government restrictions on journalistic freedom were content-based. For the video description rules, courts would provide a lesser form of scrutiny because the rules are not content-based.

²² Descriptive Video Services – Frequently Asked Questions, Media Access Group at WGBH, <http://main.wgbh.org/wgbh/pages/mag/services/description/dvs-faq.html> (last accessed on May 24, 2011).

²³ See *id.* (describing the qualifications and training of narrators).

III. THE COMMISSION MUST CLEARLY DEFINE “TECHNICAL CAPABILITY” FOR EFFECTIVE EXCEPTIONS THAT ENCOURAGE ADOPTION OF EQUIPMENT AND INFRASTRUCTURE FOR PASS-THROUGH VIDEO DESCRIPTION

In the 2000 *Video Description Rule and Order*, the Commission fails to define “technical capability” fully. The ambiguity is problematic because there are two exceptions under the technical capability umbrella: the “minimal cost” exception and the other programming-related exception. If the Commission neglects to address these issues, few stations and MVPDs will have any incentive to improve their equipment and infrastructure for pass-through video description. For clear and meaningful video description rules, the Commission must clarify the exceptions under the technical capability rule.

The Commission requires any station or multichannel video programming distributor (“MVPD”) in the top-25 market that is technically capable of passing through video description to do so.²⁴ Conversely, any station or MVPD that is *not* technically capable of passing through video description is excepted from the requirement.²⁵ There are two ways to obtain the exception. First, a station or MVPD may claim that the necessary equipment or infrastructure upgrade exceeds “minimal costs” and would be burdensome. Second, the station or MVPD could use the existing Secondary Audio Program (“SAP”) channel for other programming-related services, such as Spanish language narration. If the SAP channel is occupied, the station or MVPD are excepted from the pass-through video description requirement. The Commission would avoid implementation issues by clearly defining technical capability and preserving the other programming-related exception.

a. “Minimal Costs” Should Be Defined as a Percentage of the Station’s or MVPD’s Gross Revenue to Encourage Equipment and Infrastructure Improvements

In its current state, the technical capability rule leaves “minimal cost” undefined, a dangerous omission. Such an omission may result in stations and MVPDs declining to upgrade their equipment and infrastructure for pass-through video description. The maintenance of the

²⁴ *NPRM* ¶ 15

²⁵ *Id.*

status quo would be a profound disservice to the visually-impaired in the top-25 market. The Commission should define “minimal costs” as a percentage of the station’s or MVPD’s gross revenue to balance the cost of upgrades and the need for pass-through video description.

In the *2000 Video Description Rule and Order*, the Commission only requires pass-through video description for stations and MVPDs with “*virtually* all necessary equipment and infrastructure [to pass through video description]... except for items that would be of minimal cost” (emphasis added).²⁶ The “minimal cost” qualifier functions as an exception under the technical capability rule. If the costs of necessary upgrades or infrastructure changes exceed “minimal costs,” the station or MVPD does not need to pass through video description. The problem is that the Commission never defines “minimal cost.” The vagueness of “minimal cost” will result in limited availability of video description, subverting CVAA’s goal of spreading video description as widely as possible.

The Commission’s ultimate goal is to maximize the availability of video description. To do so, the Commission cannot allow stations and MVPDs to hide behind the technical capability rule. Clear and precise rules beget quick and effective implementation.²⁷ Meaningful video description rules *encourage* stations and MVPDs to obtain proper equipment and to build appropriate infrastructure for pass-through video description. Without further clarification, stations and MVPDs with older equipment and inadequate infrastructure could claim the minimal cost exception, even if they could afford the improvements. There are no incentives to promote equipment upgrades and infrastructure improvements for pass-through video description. The ill-defined technical capability rule merely maintains the status quo, defeating the Congressional intent of improved availability of video description.

One crucial step towards a mass upgrade is a clear and reasonable definition of “minimal cost” under the technical capability rule. The phrase “minimal cost” should not be considered in isolation. Estimates of upgrading costs for pass-through equipment range from nothing to thousand of dollars.²⁸ The cost has little meaning without context. The best available context is a

²⁶ ¶ 30.

²⁷ See also *supra* Sec. II (discussing the need for precision in effective implementation).

²⁸ Email from Larry Goldberg, Director of the National Center for Accessible Media at WGBH, to Cristina Hartmann (Apr. 25, 2011) (on file with author). See also WGBH National Center for Accessible Media Comment on

station's or MVPD's gross revenue. A \$10,000 equipment upgrade would be more burdensome for a station with \$100,000 gross revenue; the same investment, however, would have little impact on a station with more than \$1MM in gross revenue. The definition of "minimal cost" as a percentage of annual gross revenue provides both flexibility and clarity. Stations and MVPDs that have the resources will upgrade their equipment and infrastructure to pass-through video description, broadening the availability of video description. Moreover, stations and MVPDs with smaller budgets will avoid any undue economic burden from pass-through video description.

b. The Commission Must Maintain the Other Programming-Related Exception to Compensate for Legacy Analog Devices

Due to the continued availability of legacy analog devices, the other programming-related exception is still necessary. Since digital-to-analog devices are probably incapable of accessing multiple audio streams, removing the other programming-related exception would alienate visually-impaired consumers with analog televisions. The Commission must avoid such a result to achieve CVAA's objective of increasing the accessibility of video description.

The Commission states that the digital technology enables multiple audio streams, rendering the exception for other programming-related services obsolete.²⁹ That assertion is the furthest thing from the truth. Despite the 2009 transition to digital broadcasting, the digital revolution is still incomplete. There are still many legacy analog televisions and devices in American households. Video description rules, just like all other broadcasting rules, must acknowledge the continued presence of analog devices.

The remnants of the analog world impede the consumer's ability to access the multiple audio streams of the digital world. Some digital-to-analog converter boxes cannot access multiple audio streams, potentially preventing the visually-impaired from accessing video description.³⁰ Since the Commission never required converter boxes to access multiple audio

for the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010 at 3-4 (filed Apr. 28, 2011 in MB Docket No. 11-43).

²⁹ *NPRM*, ¶ 15.

³⁰ See e.g. FCC Consumer Advisory: Digital Television Transition, Digital-to-Analog Converter Box - Selected Features, <http://transition.fcc.gov/cgb/consumerfacts/converterboxfeatures.pdf> FCC Consumer Advisory: Video

streams, it is likely that few, if any, boxes can access alternative audio streams. Visually-impaired consumers, just like anyone else, may have a digital-to-analog converter box. It is unreasonable to expect the visually-impaired to buy a new digital television or a new digital-to-analog converter box to access video description. Some visually-impaired consumers with analog televisions may be left out of a service meant for them, defeating the point of the pass-through mandate.

Since the digital revolution is not fully realized, the other programming-related services exception for pass-through video description should remain. After the legacy analog devices slowly pass out of consumers' hands, the Commission can reconsider the exception. Unfortunately, that day is not today.

IV. THE COMMISSION CANNOT OVERSTEP ITS AUTHORITY TO AMEND THE REINSTATED REGULATIONS

As the Commission explores ways to improve the reinstated video description rules, the Commission can only implement limited modifications. Accordingly, the Commission must restrict its amendments to the permissible areas, such as categorical exemptions and other exceptions. Other areas, such as programming selection and quality, are off-limits for further regulation.

The CVAA explicitly states that the regulations “shall be modified *only* as follows...” (emphasis added).³¹ Congress’ use of the word “only” indicates that the Commission may modify the reinstated regulations *only* in specified areas. Two of the permissible areas of modifications are exemptions and the technical capability rule. The CVAA permits the Commission to “exempt... a service, class of services, program, class of programs, equipment or class of equipment...[if] the application of such regulation would be economically

Description and Digital Television Transition, <http://transition.fcc.gov/cgb/consumerfacts/dtvvideodescription.html> (last accessed on May 23, 2011). It is, however, unclear if *any* digital-to-analog converterboxes can access multiple audio streams since the Commission never collected any data or required the boxes to access multiple audio streams. For the sake of argument, I assume at least one digital-to-analog converter box can access multiple audio streams.

³¹ CVAA § 202(f)(2).

burdensome.”³² The CVAA also urges the Commission to “consider extending the exemptions and limitations in the regulations for technical capability reasons.”³³

The Commission’s clear authority to amend the exemptions and exceptions does not mean that the inquiry ends there. Two interpretative issues remain: (1) the meaning of individualized economically burdensome exemption; and (2) the Commission’s authority to regulate programming selection and quality.

a. The Commission Properly Substitutes the Undue Burden Standard for the Individualized Economically Burdensome Exemption

The Commission properly interprets CVAA’s individualized economically burdensome exemption as analogous to the undue burden standard in closed-captioning. Despite the confusing usage, the CVAA refers to the individualized version of the general economically burdensome standard - the undue burden standard. For clarity and simplicity’s sake, the Commission should use the undue burden standard to evaluate covered providers’ individual economic burden.

The Commission proposes to equate CVAA’s individual economically burdensome exemption with the “undue burden” standard in the closed-captioning context.³⁴ The Telecommunications Act of 1996 defines undue burden as any “significant difficulty or expense... [which] would result in an undue economic burden.”³⁵ Congress’ use of the term “economic burden” illustrates the commonalities between the undue burden and the economically burdensome standards. The undue burden standard focuses on similar issues as the general economically burdensome standard such as: economic, non-economic costs and feasibility.³⁶

³² § 202(f)(2)(D).

³³ § 202(f)(2)(G).

³⁴ *NPRM*, ¶ 22

³⁵ Pub. L. No. 104-104, 110 Stat. 56 at § 713(e) (1996).

³⁶ The undue burden standard focuses on the “nature and cost...the impact on the operation... the financial resources of the provider... the type of operation...” 1996 Telecommunications Act § 713(d).

The National Cable and Telecommunications Association's argument that the Commission should apply the more liberal economically burdensome standard forgets the purpose of the distinction.³⁷ The undue burden standard functions as an effective and meaningful way to measure economic burden on the *individual* level. The economically burdensome standard's breadth and flexibility accommodates the idiosyncrasies of an industry. The undue burden standard provides a useful rubric for evaluating a single entity. Therefore, it is reasonable for the Commission to equate the undue burden standard with the individualized economically burdensome standard in the CVAA.

The undue burden standard is a manifestation of the economically burdensome analysis, tailored for the individual entity. The focus on the individual entity makes the undue burden standard easier and clearer to implement than the broad economically burdensome analysis. Thus, the Commission properly analogizes the individualized economically burdensome analysis with the undue burden standard.

b. The Commission Cannot Interfere with Networks' Selection Process or Quality Standards for Video Description

The Commission improperly seeks regulation of programming quality and selection.³⁸ The Commission cannot interfere with the covered providers' autonomy in the selection process for two reasons. First, Congress never authorized such interference. Second, regulating programming selection and quality is nonsensical. The Commission's aspiration towards a meaningful video description regime is admirable, but there are better alternatives than improper regulation of programming quality and selection.

First, the CVAA gives the Commission limited powers to modify the reinstated regulations.³⁹ The power to regulate programming quality and selection is not among the permissible areas. The Commission would overstep its authority if it tinkers with covered providers' ability to manage its video description offerings.

³⁷ NCTA Comment for *the Matter of Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010* at 15 (filed Apr. 28, 2011 in MB Docket No. 11-43).

³⁸ *NPRM*, ¶¶ 29-30.

³⁹ CVAA § 202(f)(2). *See also supra*. nn 31-33 and accompanying text.

Second, even if the Commission had the authority to interfere with the covered provider's selection process, it would be bad policy to do so. Copyright issues require flexibility for programming selection. In *Motion Pictures of America Association v. Federal Communications Commission*, the District of Columbia Court of Appeals saw video description as "chang[ing] program content because they require the creation of new script to convey program details..."⁴⁰ Despite the court's vague wording, video description is clearly derivative work, subject to copyright laws. Therefore, copyright issues are still alive and kicking.

Such issues may affect the covered providers' ability to describe a particular program. In 2000, the Commission found that covered providers could obtain permission from the original copyright holders, oftentimes quite easily.⁴¹ Despite the apparent simplicity of the process, the Commission should allow the covered providers to decide whether to describe a copyrighted work. A covered provider may prefer to describe original programming, avoiding the process of obtaining rights. The Commission should support such discretion. Not to do so would expose the covered providers to unnecessary copyright infringement liability if they fail to follow proper procedure or would cause delays due to the potentially time-consuming process of procuring rights.

In addition to copyright issues, covered providers must consider many factors influencing the cost and feasibility of video description. For example, if a show runs overtime, the cost of description increases. A show with chronic time overruns may be unsuitable for description. Covered providers are the only ones who know about production schedules, and need the flexibility to accommodate such occurrences. Moreover, covered providers are in a unique position to understand their audience preferences and the suitability of description for different types of programming. A covered provider with an autonomous selection process for video description can control its costs and cater to its audience preferences.

The Commission *cannot* and *should not* interfere with covered providers' autonomy in managing programming selection and quality. Besides being impermissible, such regulations would have unintended consequences. Liability from copyright infringement, poor video

⁴⁰ 309 F. 3d 796, 796 (D.C. Cir. 2002)..

⁴¹ WBGH Reply Comment on the *Matter of Implementation of Video Description of Video Programming* at 32-34 (filed on March 24, 2000 in MM Docket No. 99-339).

description and unnecessary costs may result from such interference. Video description mandates are still relatively new, and covered providers will establish a system for selecting programs to describe and for improving the quality of the description.

V. CONCLUSION

In conclusion, due to the limited nature of the video description mandate, the Commission must implement meaningful and effective rules. Fifty hours of video description per quarter from nine networks is not much, but the Commission can improve the impact of these fifty hours with the proper regulations. The first step towards a more meaningful video description mandate would be clear and direct categorical exemptions. Reasonable categorical exemptions generate quicker and more effective implementation. One example of a feasible categorical exemption is a primarily auditory programming exemption. With meaningful exemptions in mind, however, the Commission should deny NAB's proposed categorical exemption for news programming.

Another step towards a meaningful video description regime would be a clear definition of the technical capability rule. If the Commission defines "minimal cost," more stations and MVPDs would upgrade their equipment and infrastructure to pass through video description. Moreover, the other programming-related exception must remain to accommodate the remaining legacy analog devices.

Meaningful video description rules, however, do not permit the Commission to overstep its statutory authority. According to CVAA, the Commission may only amend the reinstated regulations in approved areas. The Commission may alter the exemptions and the technical capability rule, but cannot regulate programming selection and quality.

Respectfully submitted,

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